

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 20, 2010

Lyle W. Cayce
Clerk

No. 09-40399

Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

FLORENCIO ESPINOZA-FAJARDO,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:08-CR-779-1

Before SMITH, PRADO, and HAYNES, Circuit Judges.

PER CURIAM:*

Florencio Espinoza-Fajardo appeals his guilty-plea convictions for possession with intent to distribute cocaine and marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1). He argues that, in light of the recent Supreme Court decision in *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009), the factual basis for his guilty plea was insufficient to support his convictions because it did not establish that he knew the specific type and quantity of controlled substances he possessed. We review this issue, raised for the first

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

time on appeal, for plain error. *United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001).

The issue raised by Espinoza-Fajardo is foreclosed by current circuit precedent, see *United States v. Gamez-Gonzalez*, 319 F.3d 695, 699-700 (5th Cir. 2003) (holding that knowledge of drug type or quantity is not an element of an offense under 21 U.S.C. § 841), which has not been overruled by *Flores-Figueroa*. See *United States v. Betancourt*, 586 F.3d 303, 308-09 (5th Cir. 2009), *cert. denied*, 2010 WL 562914 (Mar. 22, 2010) (No. 09-9048). Accordingly, the judgment of the district court is AFFIRMED.